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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GUILLERM A. SAAVEDRA,
individually and doing business
as SAAGAN MOVING & STORAGE COMPANY,

Petitioner,

v.

RAYMOND J. DONOVAN, Secretary
of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Storage Company

QUESTIONS PRESENTED FOR REVIEW

1. Where a regulation of the Secretary of Labor provided that the findings of fact of an Administrative Law Judge ("ALJ") could only be set aside if "clearly erroneous," did the court of appeals err in declining to review the decision of the ALJ and limiting judicial review to a determination of whether there was substantial evidence to support the findings of the reviewing authority?

2. Where a government contract was replete with ambiguities which misled petitioner, a first-time government contractor, did the court of appeals err in holding that the ambiguities in the contract need not be construed against the drafter?

3. Where the Department of Labor determined the liability of a government contractor for employee benefits under

the Service Contract Act pursuant to procedures prescribed by an unpublished opinion of a subordinate official of DOL, of which neither the contractor nor the general public had notice, did the court of appeals err in approving such practices in the absence of any statutory or regulatory authority for such procedures?

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PETITION FOR WRIT OF CERTIORARI TO THE

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GUILLERMO A. SAAVEDRA, individually and doing business as SAAGAN MOVING & STORAGE COMPANY, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1/ In addition to respondent the proceeding below was against DONALD ELISBURG, Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, and NAHUM LITT, Chief Administrative Law Judge, Department of Labor.

1. OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported at 700 F.2d 496 (9th Cir. 1983). The district court, the United States District Court for the Northern District of California, rendered no opinion. The opinion of the Administrative Law Judge of the Department of Labor was not reported but is set forth in Appendix C. The decision of the Secretary of Labor's Administrator, Wage and Hour Division, Employment Standards Administration was not reported but is set forth in Appendix C-1.

2. JURISDICTION

A. The judgment of the Court of Appeals for the Ninth Circuit was filed and entered February 4. 1983.

B. The Order of the Court of Appeals denying a petition for rehearing

was filed April 15, 1983.

C. Jurisdiction of this Court is based on 28 USC § 1254(1).

3. STATUTES AND REGULATIONS INVOLVED

This case involves the McNamara - O'Hara Service Contract Act, as amended, 41 USC §§ 351-358, and regulations promulgated by the Secretary of Labor implementing the Act, 29 CFR, Part 4, and establishing hearing procedures and review of such hearings by the Secretary, 29 CFR, Part 6. The relevant sections of the Service Contract Act are included in Appendix D and the relevant regulations are included in Appendix E.

The case also involves questions of agency responsibility to make available to the public its rules and regulations and opinions. Title 5 USC, § 552 provides:

> " **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**
> (a) Each agency shall make available

to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * *

(D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying --

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. ---Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. --- A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

* * *

Judicial review of the administrative process was under 5 USC § 706, which provides:

" § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determina-

tions, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of preducicial error."

4. STATEMENT OF THE CASE

A. BASIS OF JURISDICTION IN THE DISTRICT COURT

Petitioner, Guillermo A. Saavedra, individually and doing business as Saagan Moving & Storage Company (plaintiff and appellant below) brought this action against the Secretary of Labor (hereafter "Secretary") and subordinate officials of the Department of Labor (hereafter "DOL") to obtain relief setting aside the decision of the Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor (hereafter "Administrator"), reinstating those portions of a decision of an Administrative Law Judge (hereafter "ALJ") which had been reversed by the Administrator and ordering

the Secretary to direct the release to plaintiff of over $35,000 withheld from plaintiff by the General Services Administration (hereafter "GSA") at the direction of DOL. Jurisdiction in the district court was based on 28 USC §1331 (civil action arising under the laws of the United States where the amount in controversy was in excess of $10,000), 28 USC § 1361 (action to compel officers of the United States to perform duties owed to plaintiff), 28 USC §1651 (action to obtain writs of mandamus, progibition and injunction), and 5 USC §§701-706 (suit to review and compel agency action).

B. SUMMARY OF PROCEEDINGS BELOW

This case had its origins in administrative proceedings of DOL, where, on August 30, 1977, a complaint was filed by DOL alleging that petitioner had violated the McNamara-O'Hara Service Contract

Act, as amended, 41 USC §§351-358, (hereafter sometimes referred to as the "Service Contract Act", the "Act". or "SCA" , regulations issued thereunder, 21 CFR, Part 4, by failing to pay wages and fringe benefits as required under government contracts held by petitioner, and alleging that petitioner was liable for such alleged under-payments as provided in 41 USC §352(a) and was subject to the provisions of 41 USC §354(a) whereby petitioner could be barred from any contract with the United States for three years for violating the Act.

Petitioner was, and is, an individual, doing business in San Francisco as Saagan Moving & Storage Company, and was from July 1, 1975 through June 30, 1977, a government contractor under two successive one year contracts awarded by GSA, whereby petitioner was to perform moving

and related service in San Francisco (Contracts GS-09T-38, July 1, 1975 - June 30, 1976 and GS-09T-67, July 1, 1965 - June 30, 1977; hereafter referred to as "contract 38" and "contract 67", respectively).2/

Petitioner denied the allegations in the administrative complaint and raised affirmative defenses, including defenses that both contracts were vague and ambiguous and should be contrued strictly against the preparer; that eligibility for benefits under SCA should be determined by the amount of work done, under the government contracts and should be paid only

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2/ The provisions of the Service Contract Act were incorporated into contracts 38 and 67, and each contract included enumerated revisions of "Wage Determination 66-190," prepared and issued by the Department of Labor. Contract 38 included Revision 9 of said wage determination and contract 67 included Revision 11 of said wage determination. The aforesaid wage determinations purported to establish wages and fringe benefits for employees of petitioner who performed work under the GSA contracts, though such wage determinations were not applicable to general commercial work performed by the same employees for petitioner.

for work done under the contracts. Petitioner also claimed that unusual circumstances existed which precluded debarment under 41 USC §354(a).

On November 9, 1977, an evidentiary hearing was held before the Honorable Thomas Schneider, ALJ, in San Francisco, at which time witnesses were called and testified on behalf of the respective parties and documentary evidence was introduced. Thereafter the parties submitted briefs and declarations and additional documentary evidence was filed and all such evidence, documents, briefs and declarations were made part of the record. On April 10, 1978, Judge Schneider rendered a fourteen page Decision and Order (Appendix C) which thoroughly analyzed the facts as presented to him. Judge Schneider essentially found for petitioner as to all material issues of fact and law except as to two

issues and as to those, partial findings in petitioner's favor were made. It was ordered that the Department of Labor recompute the amounts due from petitioner, consistant with the ALJ's opinion, and that petitioner be paid any excess due to him from money which had been withheld by agreement under the contracts.3/ Judge Schneider further recommended that though petitioner had violated the Act, the Secretary of Labor take affirmative action to relieve him from the ineligibility provisions of 41 USC §354(a).

In the words of the Court of Appeals (Appendix A, p.3):

> "The --- ALJ concluded that Saavedra was bound by and had violated the wage determination and must re-

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3/ During the course of the administrative proceedings, petitioner and DOL entered into an agreement, whereby GSA withheld over $35,000 from petitoner which otherwise would have been due and owing under petitioner's contracts.

> compense the affected employees. But he thought the contracts confusing, sloppy, and rife with mistakes. Provisions that he thought ambiguous as to computation of amounts due he interpreted in Saavedra's favor."

In reaching his decision, the ALJ found that an unpublished letter of an assistant administrator used by DOL to compute benefits was not binding on petitioner and its use was not supported in fact or law; moreover in light of the general unavailability of prior administrative decisions interpreting the SCA, such decisions had no precedential value; and, finally, applying the rule of contra proferentum, and relying on United States v. Seckinger, 397 US 203 (1970), the ALJ did construe the ambiguities in the contracts against the government and in favor of petitioner.

DOL excepted to the decision of the ALJ, which was subject to review by the Administrator. 29 CFR §6.14. On February 26, 1979, the Administrator rendered his decision whereby each exception taken by DOL was approved and adopted verbatim (except as to the recommendation that petitioner be declared an ineligible bidder) and the Decision and Order of Judge Schneider was set aside and the case remanded for computation of amounts due to plaintiff's employees. That was accomplished, and on November 14, 1979, Judge Schneider rendered his Decision and Order on Remand and determined that, based on the mehtod of computations directed by the Administrator, $36,646.09 was due and owing from the petitioner to certain employees.

The Decision of the Administrator of February 26, 1979 followed by the Decision

and Order on Remand of the ALJ of November 14, 1979 were the final steps of the administrative process, and on January 15, 1980, the Chief ALJ forwarded the requisite recommendation that plaintiff not be subject to the ineligibility provisions of 41 USC §354(a), which recommendation was followed by the Secretary.

Petitioner then filed this action in the United States District Court for the Northern District of Calfornia on January 28, 1980, contending that the action of the Administrator was arbitrary, capricious, an abuse of decretion, and contrary to law, in excess of jurisdiction, without observance of procedure required by law, and unsupported by substantial evidence, thus petitioner sought relief in the form of reinstatement of the Decision and Order of the ALJ, and the return of the money withheld by GSA.

Cross-motions for summary judgment were filed in the district court, and the court ruled from the bench, granting the government's motion and denying petitioner's. Summary judgment was entered February 11, 1982. Saavedra appealed.

On appeal, the Court of Appeals for the Ninth Circuit noted the "government's obfuscatory practices in these contracts." Nevertheless, the court held that the unpublished policy letter could be relied on by DOL, that the contra proferentem rule did not apply because petitioner had not relied on the ambiguity, and thus the Administrator's (and therefore the Secretary's) decision was not arbitrary or capricious. The judgment of the district court was affirmed on February 4, 1983. In a petition for rehearing, Saavedra argued that the court overlooked the fact that the record showed he relied on the

the ambiguous language of the contract and acted in accordance with his reliance. The petition was denied on April 15, 1983.

The present petition for certiorari seeks review of the decision of the court of appeals on the ground that the decision below departed from applicable decisions of this Court and other courts of appeal in permitting the unpublished letter of the DOL to bind petitioner to his detriment (and for that matter, in permitting the Administrator to rely on unpublished opinions in reaching his decision) and in refusing to apply the rule of contra proferentem in construing the ambiguous contracts at issue. Finally, the petition asks the Court to rule on the effect a regulation incorporating the "clearly erroneous" standard in the administrative review process has on the standards of judicial review.

C. STATEMENT OF RELEVANT FACTS

Petitioner's first experience with doing business with the government was in 1975 when he bid on and was awarded contract 38. The facts as found by the ALJ as to the circumstance surrounding petitioner's entry into these contracts and as to the content and nature of the contractual provisions are as cogent and concise a statement of facts as can be set forth. Because one of the issues is whether the "clearly erroneous" standard of the regualtions was properly applied, the findings of the ALJ are quoted at length where appropriate in this factual narrative.4/

(1) Contract 38

The ALJ found:

4/ Footnotes to the quoted portions of the findings are not from the ALJ's decision and order.

"The Solicitation, Offer, and Award for Contract 38 was prepared in part on Standard Form 33, (Nov. 1969). The Solicitation was issued on or about April 28, 1975, and the offer was signed by [petitioner]5/ on or about June 3, 1975. The award indicated it was signed for the United States by Hugh McLuskie on June 20, 1975. The original contract was introduced as Secretary's Exhibit #1, and contains several flaws. Although page 1 indicates it is one of 20 pages, in fact there are 27 pages since GSA Form 2166 (2 pages) and GSA Form 2952 (5 pages) are attached. The amount of award is written as $95,000,000 although it was obviously intended to be $95,000.00. Page 3 and 4, entitled "Solicitation Instructions and Conditions" are poorly reproduced so as to be difficult to read in part. The rest of page 6 is legible but confusing. It sets forth the wages and fringe benefits that would be paid truck drivers, helpers, and packers if they were paid by the federal government under 5 USC §5341. This is confusing because these wages have nothing to do with wages under the contract. They are set forth merely as illustrations of what one employer (the U.S.) would pay for presumably similar work. A government witness testified that bidders often have

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5/ The ALJ opinion of course refers to Petitioner herein as "Respondent" (see Appendix C).

questions about this page. In fact, testimony before the House subcommittee considering the Act prior to its passage warned that these figures would be confusing. Schlemon, 'The Service Contract Act - A Critical Review,' 34 Fed. Bar J. 240, 247 (1975).

[Petitioner] testified that it is these figures on page 6 that he used in preparing his bid, and I credit this testimony because he had no conferences with any government official prior to submitting his bid on contract 38. --- Page 18 is the wage determination (No. 66-190 (Rev. 9) Dated: August 30, 197__ [last digit illegible]) which the government contends is applicable here. In addition to being poorly reproduced so that some words are difficult to read, it contains at least two substantive errors on its face. (1) It specifies the same minimum hourly wage ($7.19) for a helper as for a foreman, and (2) Numbers which obviously refer to footnotes under columns for Minimum Hourly Wage, Health and Welfare, Vacation, Holiday, and Pension go from 1 to 5, but the footnotes only go from 1 to 4. It appears from the evidence that it was intended that each of the numbers from 1 to 4 should have been moved to the right one column, and that the number 5 should have been omitted.

Furthermore, the first figure of the text as footnote (1), (which should have referred to Health and Welfare but literally referred to Minimum Hourly Wage) was so unclearly written that although the government contends that it was "$88.35" a government witness admitted it might be read as

"$33.35", and the compliance officer pencilled in "88.35" on his copy of the contract to make it more legible.

Pages 19 and 20 of the contract are out of order (page 20 preceded page 19 in the collated document) and are wage determination 66-491 (Rev. 8). The inclusion of this wage determination is confusing for the same reason that page 6 is confusing, i.e., that it refers to wages for Marin County which have no relevance to the work bid for by [petitioner] which is for San Francisco County only. Even a government witness was confused by this. See Tr. 15:21-16:10.---.

---Although there was conflicting testimony, the following is the most credible account of pre-award negotiations:

In the week prior to June 20, 1975, Mr. Orange, who at the time assisted the contracting officer, Mr. McLuskie, and [petitioner] had a meeting. Fringe benefits were not discussed at this meeting. However, since [petitioner's] bid seemed low, Mr. Orange called [petitioner's] attention to the minimum hourly wage set forth on page 18. In fact, except for two relatively insignificant instances, [petitioner] paid those wages. [Petitioner] had calculated his bid on the much lower wages shown on page 6 of the contract. Shortly after this meeting, and prior to receiving written notice of the award of the contract, [petitioner] called the contracting officer, Mr. McLuskie, in an attempt to withdraw his bid. [Petitioner] testified that his reason for attempting to withdraw was other work and not his miscalculation on his bid, but the inference seems reasonable

that the miscalculation was nevertheless a contributing reason. In any event, Mr. McLuskie threatened [petitioner] with 'something like if I didn't perform or he will see that I will get - - he will get me broke to the point where I won't have a place to sleep.' Tr. 186:15-18.

The bid was not withdrawn and the written award is dated June 20, 1975.

There were two subsequent changes to contract 38. The first, dated October 24, 1975 changed page 18, the allegedly applicable wage determination, to reflect that foremen should get paid more than helpers. The second, dated March 26, 1976, made some changes not relevant here.

Mr. Lawrenz, a Department of Labor compliance officer started investigating [petitioner's] compliance with contract 38 in May, 1976. By May 27, 1976, the date when [petitioner] submitted his offer on contract 67, the government was withholding $9,000.00 from [petitioner] on contract 38. In order to stay on the list of firms to which solicitations are sent decided to bid on contract 67. His bid was substantially higher than his previous bid, and he did not expect to get the award. He was not specifically informed of violations on contract 38 until June 11, 1976, about two weeks after submitting his bid on contract 67. The award was signed for the United States on June 14, 1976."

Appendix C, pp. 3-10

(2) Contract 67

The ALJ found the wage determination

of contract 67 legible and unambiguous with respect to the amount of health and welfare benefits to be awarded and with respect to eligibility, though it did contain the same ambiguities as to holiday and pension benefits as under contract 38 and those infirmities will be set forth hereafter.

(3) Eligibility for health and welfare benefits.

The compliance officer of DOL used a standard to determine eligibility for and computation of health and welfare benefits under contract 38 not articulated in the contract or in any regulation. He relied on an unpublished "sanitized" letter of an Assistant Administrator introduced into evidence as Exhibit 11. The ALJ rejected such action as arbitrary and the Administrator, adopting the DOL Solicitor's views verbatim, reversed, holding that the unpublished letter was binding and somehow the contractor

was "on notice" of such opinion (Appendix C-1, pp. 8-13).

The facts, as found by the ALJ were as follows:

> "The compliance officer computed the amount underpaid for Health Welfare on the assumption that the wage determination required a contribution by the employer of $88.35 per month for each employee who had completed 80 hours of work straight time for the employer in the previous calendar month, including both commercial work and work under the contract. He pro-rated the amount of contribution due for employees who worked less than 80 hours in any month on contract work by multiplying $88.35 by a fraction, the numerator of which is the number of hours worked on contract work that month and the denominator of which is 80.6/
>
> * * *
>
> The wage determination requires payments for each emmployee who has completed 80 hours straight time employment in the previous calendar month. It does not specify whether the 80 hours is to include both contract work and commercial work,

---

6/ The ALJ pointed out that, as noted earlier, the amount could be read as either $88.35 or $38.35 and, relying on United States v. Seckinger, 397 US 203, 210, 216(1970), he resolved the ambiguity against the drafter, the government and concluded the computations should be based on $38.35. (Appendix C p.16).

as assumed by the compliance officer, or contract work only, as urged by [petitioner]. To take one example, Danny Exon (Secretary's Exhibit 10, pages A-7, et seq.) worked more than 80 hours all together in each of the seven months from October 1, 1975 through April, 1976. However he worked more than 80 hours on contract work in only two of those months, December and April. [Petitioner] urges that this employee is entitled to Health and Welfare benefits only in the two months following December and April. If the contract itself specified clearly which hours count as qualifying, there would be no problem.--- If there were a published regulation specifying the same matter the parties would be bound by it.

However, contract 38 does not specify and there is no published regulation. Instead the Solicitor relies on a copy of a letter, dated July 10, 1970, from the then Assistant Administrator to an attorney whose name had been deleted. (Secretary's Exhibit 11.) [R. 941]. The letter appears to deal with the instant question as it arose in a specific case under a prior, presumably similar, wage determination. It clearly supports the compliance officer's approach, urged here by the Solicitor. It may be evidence of an administrative practice, but it cannot be binding on a private citizen. City of New York v. Diamond, (SDNY 1974) 379 F. Supp. 503, 516, 518."

Appendix C, pp. 15-18.

The ALJ concluded that Petitioner was not required to pay health and welfare benefits for any employee who worked less than 80 hours on contract work during the previous month. Id., p. 20.

(4) Eligibility for holiday and pension benefits

The evidence as to holidays and pension benefits under both contracts 38 and 67, as found by the ALJ was as follows:

> "The wage determination (Secretary's Exhibit 1, p. 18) specifies that there are 11 paid holidays per year provided the employee has been employed by the employer for at lease 13 days in the month in which the holiday occurs. The same question arises here as in the Health and Welfare area, to wit, does '13 days' refer to both contract and commercial work for the employer or does it refer to contract work only? Nor is there anything to suggest whether full days or partial days are meant. In the absence of clear contractual language or governing regulation, [petitioner] is entitled to have such latent ambiguities resolved in his favor. Accordingly, I conclude that [petitioner] was required to pay holiday pay only for those employees who worked 104 hours

or more (8X13) on contract work in the month in which the holiday occurs. With this interpretation of the wage determination language it becomes unnecessary to apportion the amount paid for holiday pay. If the employee qualifies for the benefit in any month, he is entitled to one full day's pay at the straight time contract rate for eight hours for any holiday on which he works.

* * *

The wage determination specified that pension benefits payments are $3.70 a day for each employee who has worked at least four hours in that day. The same ambiguity exists here as with Health and Welfare and Holiday benefits, i.e., does the 'four hours' refer to four hours of work done on both commercial and contract work together, or does it refer only to work under the contract. Again, absent clear contract language or specific regulation, [petitioner] is entitled to have such ambiguity resolved in his favor. Accordingly, I conclude that [petitioner] was required to make a $3.70 payment only to such employees as worked more than four hours in any day on contract work. This precludes the necessity of further apportioning the amount of contribution."

Appendix C, pp. 26-28.

The Administrator found that though the unpublished 1970 letter does not refer

to these fringe benefits, it should be applied.

Appendix C-1, pp. 13-15.

(5) Unpublished and unindexed opinions

In reaching his decision, the ALJ declined to follow decisions of other ALJ's and the Administrator cited and relied on by DOL, because:

> "The cited decisions are available to the public only by name and number and are not indexed by subject matter. It is therefore impossible, from a practical standpoint, for an attorney to find decisions that may be favorable to his client. (This statement is based on an affidavit by [petitioner's] counsel which has not been controverted).
>
> The very able atorneys in the Solicitor's office may be expected to be familiar with these decisions because of their thorough knowledge of the proceedings that result in these decisions. It would give the Solicitor an unfair advantage, in an adversary setting such as this, to rely on data which only he has the means of retrieving."

Appendix C, pp. 36-37.

The Administrator reversed this

finding, quoting the unsworn statement of the DOL Solicitor that such decisions were published in various reporter services. Appendix C-1, pp. 16-17. Counsel for petitioner had filed an additional declaration under penalty of perjury with the Administrator establishing that no meaningful publication or indexing existed, but the Administrator simply accepted the unsworn conclusion of the Solicitor without critical analysis.

(6) Ineligibility under 41 USC §354(a)

The ALJ recommended that [petitioner] be relieved from being placed on the ineligible bidders list as provided in 41 USC §354(a) for the following reasons:

> "I find that the following are unusual circumstances, upon which I rely as reasons for the recommendation: contract 38 was the first contract [petitioner] ever had with the federal government and contract 67 the second. When [petitioner] tried to withdraw his bid, he was threatened with action that would

cause his bankruptcy. By the time of his bid on contract 67 he had not yet been specifically told of contract violations, but felt duress because the government was withholding $9,000.00. He was afraid that he would not get any further government contracts if he did not submit a bid. When specific violations were called to his attention, and he had assistance of counsel an agreement was reached for withholding sufficient amounts to insure that employees would be paid all amounts found due, in accordance with 41 USC §352(a). Respondent at the hearing evidenced the fact that he does not speak English perfectly. He usually has only five or six employees and is, like many people, reluctant to seek an attorney's advice until after problems have been called to his attention. Furthermore, contract 38 was confusing and sloppy. Contract 67 was less sloppy but still contained the ambiguities discussed above."

Appendix C, pp. 37-38

5. REASONS FOR GRANTING THE WRIT

The decision of the court of appeals applying the general rules of judicial review under 5 USC §706 rendered the restraints imposed by 29 CFR §6.14 meaningless. Since 29 CFR §6.14 permits the

Administrator to set aside the findings of the ALJ only if clearly erroneous, the focus of inquiry should be whether there was evidence before the ALJ to support his findings. Though lower courts have addressed the issue with different results, this Court has not determined the effect of such a binding regulation on judicial review.

Moreover, the decision of the court of appeals not to apply the rule of contra proferentem was contrary to decisional law among the courts of appeal and this Court.

Finally, though the determination of eligibility for benefits was based on an unpublished letter opinion of a DOL official, the court of appeals declined to enforce the requirements of publication as set forth in 5 USC §552 (and §553) and held that eligibility for benefits

could be based on commercial as well as government contract work, though the SCA and the regulatory scheme implementing the Act made it clear that benefits were to be paid only to employees working on government contracts. The court's decision was a departure from accepted principles of decisional and statutory administrative law.

All of these issues present important questions of federal law governing the relationship of federal agencies with private citizens with whom they do business, which have not been, but should be, settled by this Court.

A. THE FOCUS OF JUDICIAL REVIEW SHOULD HAVE BEEN TO INQUIRE WHETHER THE FINDINGS OF THE ALJ WERE CLEARLY ERRONEOUS

The court of appeals found that:

> "The Secretary's decision was not arbitrary nor capricious, was in accordance with law, and was supported by substantial evidence. Most of his

> reversals of the ALJ were on legal issues. His conclusions on these conformed to the Act's purpose and to departmental policy, published and unpublished. Reversals of factual findings were limited to those he reasonably considered clearly erroneous."

Appendix A, p. 18.

But, though the court noted that there was a special standard governing SCA proceedings, i.e. 29 CFR §6.14 (Appendix A, pp. 6-7), it nevertheless held that:

> "The decision for court review is that of the agency, here the administrator's decision adopted by the Secretary. The court does not review the ALJ's decision, which is merely part of the record."

Appendix C, p. 5.

Under the usual standards governing judicial review of agency action, it is true that a decision of an ALJ is but one step in the administrative process; and disparity between a decision by an ALJ and final agency action does not serve to modify the "substantial evidence"

standard, though such contrary findings might lead a court to conclude that the evidence upon which the final decision was based was less substantial. Universal Camera Corp. v. Labor Bd., 340 US 474, 496 (1951).

But in this case, at least with respect to findings of fact, the decision of the ALJ is not but one more factor in the determination of whether the evidence supporting the Administrator's decision was substantial. Compare id., pp. 496-497. Here there was a regulation binding on the agency which provided that,

> "With respect to the findings of fact, the Administrator shall modify or set aside only those findings that are clearly erroneous."

29 CFR §6.14.

Indeed, even in the absence of such a regulation, some courts have held that findings of a hearing examiner (now ALJ)

are conclusive if supported by a preponderance of the evidence and his findings can only be overruled if "clearly incorrect." United States v. Powers Building Maintenance, 336 F. Supp. 819, 822 (W.D. Okla. 1972); United States v. Southland Manufacturing Corporation, 264 F. Supp. 174, 177 (P.R. 1967).

Though the "clearly erroneous" rule may not be a constitutional requirment in administrative proceedings, the same standard applicable to appellate courts in reviewing decisions of trial courts under the "clearly erroneous" rule must be applicable to administrative appeals where such standard is adopted by regulation. Compare National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484, 490 (2d. Cir. 1952); and see Masters v. Maryland Management Company, 493 F. 2d 1329, 1333 (4th Cir. 1974).

This Court has stated that,

> "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'"

United States v. Oregon State Medical Soc., 343 U.S. 326, 339 (1952), citing and quoting from United States v. U.S. Gypsum, 333 U.S. 364, 395 (1948); and see White Glove Building Maintenance, inc. v. Brennan, 518 F. 2d 1271 (9th Cir. 1975).

If the evidence can be viewed as supporting either of two conclusions, if the trier of fact decides one way, such a decision cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

It is the responsibility of the ALJ to evaluate the credibility of witnesses and to determine the weight to be given their testimony, NLRB v. Anthony Co., 557 F. 2d 692, 695 (9th Cir. 1977); and,

it is the decision of the ALJ which must be examined to see if it is supported by evidence and if so it must be affirmed as provided in 29 CFR § 6.14; NLRB v. Dinion Coil Co., supra. Even if the Administrator (or the court) disagrees with the findings made by the ALJ, the case cannot be decided differently unless the ALJ was clearly erroneous. White Glove Building Maintenance, Inc. v. Brennan, supra.

In this case, the ALJ made a number of findings of fact which the Administrator set aside and replaced with his own findings. Thus, the ALJ determined that petitioner justifiably relied on the wages set forth at page 6 of the Solicitation in preparing his bid and that though the actual wages to be paid were explained to petitioner, fringe benefits were never discussed. The Administrator ignored petitioner's reliance and said there was

no reliance or any ambiguities in the contract

The ALJ further found as a fact after an examination of the wage determination that the amount of health benefits was illegible and could be read as $88.35 or $38.35. The Administrator disagreed, based on an analysis of the transcript. But it was clear that the ALJ based his finding on an examination of the document itself. He stated at the hearing, that the document,

> ". . . speaks for itself. I will decide how readable it is."

The document was in evidence and the ALJ's finding was supported by other evidence, both testamentary and documentary. Such finding must be affirmed since the Judge's appraisal of documentary evidence must be given as much weight as his rulings on credibility. United States v. Alaska Steamship Company, 491

F. 2d 1147 (9th Cir. 1974).

Finally, the ALJ determined, based on evidence presented to him that certain administrative decisions were not generally available to the public and were not indexed by subject, thus precluding counsel as a practical matter from finding favorable cases. The latter finding was based on an uncontroverted declaration of counsel which showed that said decisions are unpublished and generally unavailable. The Administrator adopted the unsworn conclusory allegations of the DOL Solicitor that such decisions were available, despite the repeated sworn statements of Petitioner's counsel. Such blatant disregard of the facts established before the ALJ, were accorded deference by the court of appeals, which apparently approved the Administrator's finding. Appendix A, p.10.

Under 29 CFR § 6.14, the Administrator

should not have set aside the ALJ's findings on these three crucial issues. As we shall see in the following argument, the Administrator's conclusion that petitioner did not rely on ambiguities in the contract was the lynchpin in the agency decision reversing the ALJ and the decisions of the courts below affirming that decision. But the ALJ's decision that petitioner did justifiably rely on the ambiguity was supported by evidence, including the testimony and personal character and background of petitioner: credibility, if it please the Court.

The Administrator, adopting the DOL Solicitor's arguments, concluded that the ALJ should have requested other evidence not presented at the hearing (an otherwise irrelevant wage determination) to determine whether the wage determination in

question was actually $88.35 or $38.35.7/

But it was not up to the ALJ to introduce evidence; rather it was up to the adverse parties to present that relevant evidence each deemed appropriate. Decisions of a trial judge must be based on the evidence introduced before him. United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946); Department of Pub. Serv. Reg., Etc., Mont. v. United States, 344 F. Supp. 1387, 1388 (Mont. 1972). Agency action must be sustained by the record. Midwest Maintenance & Const. Co. v. Vela, 621 F. 2d 1046, 1050-1051 (10th Cir. 1980).

Just as it is the record before the trial judge which must form the basis of the reviewing court's judgment on appeal, United States v. Pierce Auto Freight Lines,

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7/ Not unlike the Administrator's decision to ignore the evidence presented to the ALJ on the issue of availability of other agency opinions.

supra; Department of Pub. Serv. Reg., Etc. Mont. v. United States, supra, so, under 29 CFR § 6.14, the court of appeals should have examined the record before the ALJ to determine if the evidence supported his decision. Only in the absence of such evidence could the ALJ's findings be considered clearly erroneous. White Glove Maintenance, Inc. v. Brennan, supra; compare United States v. Yellow Cab Co., supra. Here the evidence not only supported the ALJ's findings of fact, there simply was no other credible evidence supporting any contrary determination.

> "'Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth.*** How can we say the Judge is wrong? We never saw the witnesses.*** To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.'"

United States v. Oregon State Medical Soc., supra, 339.

The determination by the court of appeals not to review the ALJ's decision, prevented it from making the determination required by law, i.e. whether the findings of the ALJ were clearly erroneous. This Court should take this opportunity to clearly articulate the proper scope of judicial review when courts are faced with the interposition of a"clearly erroneous" standard within the agency proceedings.

B. THE CONTRACTS WERE AMBIGUOUS AND SHOULD HAVE BEEN CONSTRUED AGAINST THE MAKER, THE GOVERNMENT

The Administrator, adopting the DOL Solicitor's views, decided that the rule of contra proferentem, applied by the ALJ, was inapposite because petitioner did not rely on the ambiguity.

It is true petitioner was not aware of the meaning of the wage determination or the necessity to pay fringe benefits when he bid on the contract; nor was he ever

made aware of the fringe benefits after he bid. But petitioner clearly "relied" on and was misled by the ambiguities in the contract, particularly the wage rates set forth at page 6.8/ The juxtaposition of footnotes in the wage determination, the inclusion of a Marin County determination, and the presence of the wage rates at page 6, obviously misled and confused petitioner. It is conceded he was unaware of his full obligation. But it is a quantum leap from there to where the administrator and court of appeals arrived.

The administrator and court of appeals cited Dale Ingram, Inc. v. United States, 475 F. 2d 1175, 1185 (Ct. Cl. 1973), to support the conclusion that a contractor

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8/ In fact, petitoner actually paid his employees more than he was required to under the schedule set forth at page 6 plus fringe benefits, once he was apprised of the fact that higher wages must be paid, $7.165 per hour, as compared to $6.20 per hour plus fringe benefits of 9% for a total of $6.78 per hour due under the schedule at page 6 of contract 38.

must show reliance on an ambiguity in a contract before the contra proferentem rule applied. But the decision in Dale Ingram was only the then latest of a line of authority exemplified by cases such as Brezina Construction Company v. United States, 449 F. 2d 372 (Ct. Cl 1971) and WPC Enterprises, Incorporated v. United States, 323 F. 2d 874 (Ct. Cl. 1963), both cited by the court in Dale Ingram. In Brezina, citing WPC Enterprises, the court held that,

> "The rule, often repeated by this Court, is that if a Government contract is ambiguous and if the construction placed upon it by the contractor is reasonable, the contractor's construction will be adopted, unless the parties' intention is otherwise revealed."

449 F. 2d at 375.

Moreover, the court pointed out that only where there is a "patent and glaring" ambiguity is there a duty to seek clarification. The court stated:

> "Here, we have already determined that plaintiff's construction of the contract was reasonable, and there is no assertion that plaintiff acted in other than good faith. Certainly we think that these circumstances are relevant to the inquiry as to the patency and glaringness of the contractual discrepancy, because saying that a contractual provision contains a patent discrepancy is tantamount to saying that no reasonable construction of the provision can be made unilaterally by the contractor until the discrepeancy is resolved by the parties."

Ibid.

In this case, there is no question that petitioner acted reasonable in concluding that his wage responsibility was governed by the wages at page 6 of the contract. Moreover, when the contracting officer told him he had to pay more wages, he reasonable could assume that that officer would have told him of any other responsibilities he had. Since petitioner's interpretation of the contract was reasonable, the contra proferentem rule applies

and all ambiguous language of the contract should be construed against the maker, here the United States. H & M Moving, Inc. v. United States, 499 F.2d 660, 671, 673 (Ct. Cl 1974).

The court of appeals apparently accepted the Administrator's finding that petitioner did not rely on his interpretation of the contract; but it is clear that petitioner not only reasonably relied on his interpretation but acted upon it and then acted in compliance with what he understood to be the contracting officer's clarification of the wage scales to be applied.

The court of appeals noted the government's "obfuscatory practices in these contracts" but nevertheless held petitioner responsible, though the record shows that he acted in good faith and in compliance with what he reasonably believed

to be the contractual obligations he had assumed.

In United States v. Seckinger, 397 US 203, 210, 212, 216 (1970), this Court held that a contract must be construed most strongly against the maker, particularly when the drafting party is the government, with its strong bargaining position. The Court then interpreted the clause in question (an indemnity agreement) in a manner neither party had prior to entering the contract. See 397 US at 215.

Here, GSA knew petitioner interpreted the contract in a manner which conflicted with the wage determination, yet did nothing to ensure that petitioner be made aware of his obligations; thus, the contract must be interpreted in favor of petitioner and all ambiguities must be resolved against the drafter of the contract.

United States, etc. v. Haas & Haynie Corp., 577 Fed. 568, 573, 574 (9th Cir. 1978).

A government contractor cannot be expected to exercise clairvoyance. Corbetta Construction Company v. United States, 461 Fed. 1330, 1336 (Ct Cl 1972). He cannot be charged with knowledge of that which the government made obscure.

As the court of appeals for the fifth circuit observed in Diamond Roofing v. Occupational S. & H. Rev. Com'n., 528 F. 2d 645, 649 (5th Cir. 1976):

> "An employer. . .is entitled to fair notice in dealing with his government."

"Fair notice" does not contemplate after the fact advice of obligations. WPC Enterprises, Incorporated v. United States, supra, 879.

The decision of the court of appeals denying petitioner the benefit of the rule of contra proferentem was contrary

to decisional law of this Court and courts of appeals as noted above and this Court should now, 13 years after its decision in Seckinger, decide this case and clearly establish the standards of fairness which should be applied to contractors dealing with their government.

C. THE USE OF AN UNPUBLISHED LETTER OPINION OF AN OFFICIAL OF THE DOL TO DETERMINE PETITIONER'S OBLIGATIONS WAS CONTRARY TO LAW AND THE METHOD USED WAS OTHERWISE UNAUTHORIZED AND ARBITRARY

The DOL enforcement officer, Lawrenz, relied on an unpublished, "sanitized" letter opinion of an assistant administrator to determine that eligibility for benefits should be based on both government contract and private commercial work. The ALJ rejected the use of such letter as authority for the determinations and found, as petitioner argued, that the statutory and regulatory scheme did not support the

enforcement officers actions.

He found as follows:

> "The scheme of the Act as a whole supports [petiitoner's] contention. Thus, the Act requires that minimum wages be paid 'in the performance of the contract,' not to all employees of the contractor. 41 U.S.C. § 351(a)(2). 'Service employee' is defined as 'any person engaged in the performance of a contract...' 41 U.S.C. § 357(b) (emphasis added). 29 C.F.R. § 4.146 states that the contractor 'is required to comply with the provisions of the Act and regulations thereunder only while his employees are performing on the contract....'
>
> The Solicitor suggests an analogy to 29 C.F.R. § 4.171(b)(2), which refers to vacation benefits. Vacations, which are based on years of service with an employer may well be subject to different considerations than Health and Welfare benefits which are based on hours worked. Rather than supporting the Solicitor, the regulation shows that a regulation could easily be written that would support him. See Diamond Roofing v. Occupational S. & H. Rev. Com'n, (5 Cir. 1976) 528 F. 2d 645, 648-649.
>
> These considerations lead me to conclude that [Petitioner] was not required to pay Health and Welfare benefits for any employee who worked less than 80 hours on contract work during the previous month."

Appendix C, pp. 18-20.

The same considerations led the ALJ to reject similar determinations of eligibility for holiday and pension benefits. Id., pp. 26-28, 34-35.

the Administrator, of course, rejected the ALJ's conclusions and the court of appeals determined not only that the lack of publication was not fatal, but also that the procedures in the letter paralleled DOL's methods in determining eligibility for vacation benefits under 29 CFR § 4.171, thus were not arbitrary. Appendix A, pp. 12-13.9/

9/ The court of appeals suggested that computation of the amount of benefits by using a ratio of contract work compared to total work would be inequitable. The issue is not raised in this petition, since before reaching the question of the amount of benefits eligibility must be determined. If 80 hours of contract work is required for eligibility then it may be that a full benefit should be paid to such employees; but if 80 hours of combined work is only required, then the method of computation suggested by Petitioner would be far more equitable.

The court of appeals ignored the command of 5 USC § 552 which clearly requires publication and indexing of opinions, rules and regulations before a party may be adversely affected by the same.10/ See also 5 USC § 553. The failure to publish the letter opinion here is fatal. In Re Pacific Far East Line, Inc. 314 F. Supp. 1339, 1348 (N.D. Ca.. 1970) aff. 472 F. 2d 1382 (9th Cir. 1973). Such unpublished procedures cannot stand against a person adversely affected thereby. Northern California Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.C. 1975), aff 539 F. 2d 243 (D.C. Cir. 1976); see also Hartnett v. Cleland, 434 F. Supp. 18, 21, n.7 (S.C. 1977). The procedures set

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10/ The same may be said as to the unpublished and unindexed opinions of ALJ's and Administrtors which the ALJ refused to consider, but which the Administrator and court of appeals agreed were appropriate administrative authorities. See USC § 552 (a)(2)(A)(i)(ii).

forth in the letter opinion relied on by DOL are absolutely void. City of New York v. Diamond, 379 F. Supp. 503, 516 (S.D.N.Y. 1975).

Nor was the court of appeals correct in its determination that since the opinion was consistant with agency practice with regard to vacation pay that the practice followed was one to which deference must be given.

The ALJ noted that different considerations obviously could motivate the Secretary in establishing eligibility for vacation pay rather than other fringe benefits. The court of appeals had no legal basis in relying on the existence of 29 CFR § 171 (b)(2) to establish the validity of the procedures employed by the DOL in determining eligibility for other short term benefits. The existence of 29 CFR § 171(b)(2) merely makes it clear that

the Secretary knew how to issue regulations establishing the procedures and criteria to employ in calculationg fringe benefits. Part 4 of Title 29 CFR is an extremely detailed compendium of methodology and policies concerning computation of wages and fringe benefits under the Act. Where deviation was thought to be necessary from the statutory and regulatory policy of rewarding employees only for work performed under the contract the Secretary clearly stated that intent, e.g. 29 CFR §4.171(b)(2). One cannot then assume or imply that the Secretary meant that a similar approach, unarticulated in the regulations, should be taken with respect to other types of benefits. See Diamond Roofing v. Occupational S. & H. Rev. Com'n, supra., 648. As the Court observed in Diamond Roofing, if a regulation misses the mark, there is no need to press

its limits by judicial contruction since the matter is easily remedied by amendment; moreover, only the Secretary has the power to promulgate regulations, not the courts or administrators, and a regulation cannot be construed to mean what was intended but not adequately expressed. 528 F. 2d at 648-649. See also Montgomery Ward & Co., Inc. v. F.T.C., 691 Fed. 1322, 1332 (9th Cir. 1982).

The entire regulatory and statutory scheme makes it clear that only work under government contracts gives rise to benefits under SCA. In addition to 41 USC §§ 351(a)(1), 351(a)(2), 357(b) and 29 CFR §4.146 cited by the ALJ in the portions of his decision quoted in this section, see also 29 CFR §§ 4.150, 4.151, 4.152, 4.165(a)(2), 4.170(a), and 4.173 included in Appendix E for other examples of regulations clearly providing benefits only for work done

under government contracts. Contrary to the conclusions of the court of appeals and the Administrator, the entire statutory and regulatory scheme rewards work done under government contracts not general commercial work.

There is no doubt that the 1970 letter opinion relied on by the Department of Labor, whether viewed as an interpretive ruling or otherwise was used in a was to affect the substantive rights of persons, such as petitioner outside the Department of Labor, and thus was required to be published. Anderson v. Butz, 550 F. 2d 459, 462-463 (9th Cir. 1977); Percy v. Brennan, 384 F. Supp. 800, 813 (S.D.N.Y. 1974); Piercy v. Tarr, 343 F. Supp. 1120, 1128 (N.D. Cal. 1972). In the absence of such publication it was void. Anderson v. Butz, supra; Saint Francis

Hospital v. Weinberger, 413 F. Supp. 323, 327 (N.D. Cal. 1976).11/

The interpretation given the regulation by the enforcement officer and the Administrator is without any legal or rational basis and need not be given any deference whatsoever. Harris v. Levi, 416 F. Supp. 208, 210 (D.C. 1976), affirmed in part and modified in part sub nom. Harris v. Bell, 562 F. 2d 772 (D.C. Cir. 1977).

Giving deference to an agency's interpretation of its rules is not an absolute requirement and particularly where the interpretation involves giving meaning to regulatory language, there is

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11/ It may also be noted that in contract 67, the Secretary sought to correct the latent ambiguity which existed in the prior wage determination with respect to use of non-contract time in determining whether the 80 hour qualification had been met. Such an admission of prior ambiguity, H. & M. Moving, Inc. v. United States, supra, 667, 671, calls for invocation of the rule of construction established in United States v. Seckinger, supra, i.e. the contract must be construed against the drafter. 397 U.S. at 210.

little reason to defer to the agency's interpretation. Montana Power Co. v. Environmental Protection Agency, 429 F. Supp. 683 (Mont. 1977); see also Southern Packaging and Storage Co. v. U. S., 458 F. Supp. 726, 731-734 (So. Car. 1978).

Indeed, a reviewing court is not only not bound by an agency's interpretation of its own rules, but must overturn an interpretation which is inconsistant with its published regulations. Tenneco Oil Co. v. Federal Energy Administration, 613 F 2d 298, 302 (Em. App. 1979).

In this case the statutory and regulatory scheme dictates that no fringe benefits will be paid except for work performed under government contracts. Petitioner cannot be charged with the obligation to pay fringe benefits based on commercial non-contract work, without at least a specific contractual requirement

to do so. The unique system of calculating eligibility devised by the Assistant Administrator in 1970 and followed in this case must fail as not being based on either contract, law, or reason, and as against Congressional and Administrative policy as set forth in SCA and the regulations promulgated under its authority. Compare United States v. Larionoff, 431 US 864, 873 (1977).

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its descretion.'"

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

This Court must adjudicate this case to bring it within the statutory commands of 5 USC §§ 552, 553 and decisional law.

6. CONCLUSION

The petition for writ of certiorari should be granted.

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